

## HR Weekly Podcast July 22, 2015

Today is July 22, 2015, and welcome to the HR weekly podcast from the Division of State Human Resources. Today's topic discusses whether employers can ask employees to work during Family Medical Leave, or FMLA. Information used for this podcast was obtained from an article from HR Morning entitled "Can you ask employees to work during FMLA leave? Better be careful" written by Tim Gould.

While it is not uncommon for an employer to check in occasionally with an employee on FMLA leave, caution should be taken to avoid asking the employee to do anything that resembles work while on leave.

In the case of *Smith-Schrenk v. Genon Energy* out of the United States District Court for the Southern District of Texas, Joan Smith-Schrenk was employed as an Ethics Department Manager at Genon Energy.

She observed that, upon giving notice that she needed FMLA leave for upcoming surgery, her supervisor became hostile towards her and also required her to perform a considerable portion of her regular job duties while she was out on leave.

During her two months of FMLA leave, Smith-Schrenk argued that she was required to perform 20 to 40 total hours of work on tasks, such as updating compliance cases, revising a safety review project, and dropping files off at the office.

Following Smith-Schrenk's return to work from FMLA leave, she resigned within one month claiming that her supervisor created a hostile work environment as soon as she began working again. She then filed a FMLA lawsuit shortly after resigning and claimed that the hours of work performed while on leave constituted interference.

The court stated that there was enough evidence of FMLA interference for a jury to decide the case. The court stated "reasonable contact limited to inquiries about the location of files or passing along institutional or status knowledge will not interfere with an employee's [FMLA] rights; however, asking or requiring an employee to perform work while on leave can constitute interference."

In addition, in the *Vess v. Select Medial Corporation* case out of the United States District Court for the Northern District of Ohio, the company faced a lengthy trial because of the volume of work assigned to an employee on FMLA leave. The court in this case specified the type of work-related activities managers can ask of employees on FMLA leave, which included passing along institutional knowledge to new staff; providing computer passwords; seeking closure on completed assignments; and identifying other employees to fill voids.

Employers can contact an employee on leave to check on return dates, possible extensions of leave, as well as to discuss terms or conditions of employment to aid with a back to work transition. It may also be helpful for employers to put in writing that, other than minor tasks such as providing passwords or institutional knowledge, employees are not expected to perform any work while on FMLA leave. Finally, it may

also be helpful for employers to communicate with their legal counsel if there are any questions on what is acceptable and unacceptable when contacting an employee on FMLA leave.

Thank you.